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In The

Supreme Court of the United States

October Term, 1998

THEODORE J. DITTRICH,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the doctrine of "delayed subsuming", created by the Court of Appeals for Veterans Claims ("CAVC"), has any valid basis or origin in law.

Whether the doctrine of "delayed subsuming" directly conflicts with a veteran's right to collaterally attack prior unappealed decisions, as authorized by 38 U.S.C. § 5109A, 38 C.F.R. 3.105(a) or 38 U.S.C. § 7111.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 11
CONCLUSION 15
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Chisem v. Gober, 10 Vet.App. 526 (1997) 5

Crippen v. Brown 9 Vet.App. 512 (1996) 7, 13

Dittrich v. West, 163 F.3d 1349 (Fed.Cir. 1998) ... 1, 6, 7

Donovan v. Gober, 10 Vet.App. 404 (1997) 5, 6, 9, 10, 11

Look v. Derwinski, 2 Vet.App. 157 (1992) 7

Smith v. Brown, 35 F.3d 1516 (Fed. Cir. 1994) ..6, 7, 8, 9

STATUTES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 5109A ..... *passim*

38 U.S.C. § 7104(a) and (b) ..... *passim*

38 U.S.C. § 7111 .....5, 7, 8, 9, 14

REGULATIONS

38 C.F.R. § 3.1(p) 12

38 C.F.R. § 3.105 .....8, 14

38 C.F.R. § 3.105(a) ..... *passim*

OTHER AUTHORITIES

H.R.Rep. No. 105-52, at 2 (1997) 8

Pub. L. No. 105-111, 111 Stat. 2271 (Nov. 21, 1997) 5, 6, 8

S.Rep. No. 105-157, at 4 (1997) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 163 F.3d 1349 (Fed.Cir. 1998) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Dittrich v. West* is published at 11 Vet.App. 10 (1998) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on December 28, 1998.

PROVISIONS INVOLVED

38 U.S.C. § 7104(a) and (b)

(a) All questions in a matter which under section 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. The Board shall decide any such appeal only after

affording the claimant an opportunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

38 U.S.C. § 5109A.

(a) A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed and revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after the decision is made.

(e) such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 C.F.R. § 3.105(a)

(a) Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependence, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provision of Sec. 3.500 (b) (2) will apply.

STATEMENT OF THE CASE

1. Mr. Dittrich served on active duty in the U.S. Army from January 27, 1953 to December 22, 1954. In August 1959, Mr. Dittrich applied for service connection benefits for a nervous condition. In a ratings decision dated March 21, 1960, the Department of Veterans Affairs ("VA") denied Mr. Dittrich's claim. Mr. Dittrich did not file a timely appeal of this denial.

Subsequent to the 1960 denial, the VA's regional office continued to receive medical evidence regarding Mr. Dittrich's schizophrenia in support of his claim to entitlement for service connection. In December 1968, the regional office issued a rating decision stating that the submitted medical evidence was insufficient to reopen Mr. Dittrich's claim for service connection for schizophrenia. Mr. Dittrich appealed this decision to the Board of Veteran's Appeals ("BVA"), which, in a June 1969 decision, found that new and material evidence had been submitted and reopened Mr. Dittrich's claim, but subsequently denied the claim on the merits.

Between August 1979 and June 1993, the BVA refused five times to reopen Mr. Dittrich's claim for service connection. Mr. Dittrich appealed the BVA's 1993 decision refusing to reopen his claim, to the CAVC. In July 1994, based on a joint motion for remand, the CAVC dismissed the issue of whether there was new and material evidence to reopen the claim, but instead remanded the claim to the BVA to determine whether there was Clear and Unmistakable Error ("CUE") in the original March 1960 rating decision. The CVA remanded the case for a determination of CUE pursuant to 38 C.F.R. § 3.105(a), which provides for collateral attacks on previous determinations that are final and binding. There was no statutory basis for CUE at that time.

The BVA remanded the CUE claim to the regional office, since CUE had not been previously adjudicated by the regional office. In a June 1995 decision, the RO found that there was no well grounded claim of CUE in the March 1960 rating decision. Mr. Dittrich appealed the regional office's decision to the BVA. In an August 1996

decision, the BVA concluded there was no CUE, as a matter of law, since the March 1960 rating decision had been subsumed by the June 1969 BVA decision.

Mr. Dittrich appealed the BVA's 1996 decision to the CAVC. After both parties had completed briefing the issues, but before the CAVC issued its decision, Pub. L. No. 105-111, 111 Stat. 2271 (Nov. 21, 1997) was enacted. This law amended Title 38 of the United States Code to include § 5109A, which provides a statutory basis for CUE claims as well as § 7111, which permits review of BVA decisions for CUE.

In a January 6, 1998 decision, a three-judge panel of the CAVC upheld the BVA's decision, merely finding that the CAVC's holdings in *Donovan v. Gober*, 10 Vet.App. 404 (1997) and *Chisem v. Gober*, 10 Vet.App. 526 (1997) were controlling, and that the 1969 BVA decision had subsumed the unappealed March 1960 rating decision. The CAVC further determined that Pub. L. No. 105-111 had no effect on the rulings in *Donovan* and *Chisem* and was therefore not relevant to its decision, although neither party was given the opportunity to brief the CAVC on that issue. The CAVC subsequently denied en banc consideration of Mr. Dittrich's case.

Mr. Dittrich appealed the CAVC's decision to the Federal Circuit. Mr. Dittrich claimed that the doctrine of "delayed subsuming" directly contradicted both 38 C.F.R. § 3.105(a) and 38 U.S.C. § 5109A. In a December 28, 1998 decision, the Federal Circuit affirmed the CAVC's decision.

The Federal Circuit first determined that pursuant to 38 U.S.C. § 7104(a) & (b), once a claim is disallowed by

the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered. The Federal Circuit therefore concluded that 38 U.S.C. § 7104 prevents a regional office from reopening and allowing a claim disallowed by the Board unless new and material evidence had been successfully submitted and that a regional office may not consider a claim based on the same operative facts as the claim earlier rejected by the BVA. It is apparent that the Federal Circuit considers § 7104 to provide for administrative finality. It should also be noted that the CAVC's decision in *Dittrich* and *Donovan* neither cite to nor rely upon 38 U.S.C. § 7104 to support "delayed subsuming."

The Federal Circuit next discussed *Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994), which held that review of a BVA decision by the regional office would permit an inferior to collaterally review the actions of a superior, and that Title 38 forbids this type of challenge pursuant to 38 U.S.C. § 7104(b).

The Federal Circuit surmised that based upon *Smith* and 38 U.S.C. § 7104, the CAVC had concluded, in *Donovan*, that a regional office could not alter a final decision to conflict with a prior BVA decision that rested on the same operative facts. The Federal Circuit, however, determined that *Donovan* did not completely control the issue in the present case due to Pub. L. 105-111, which superseded the *Smith* holding, in that it authorized review of prior BVA decisions on the grounds of CUE. Ultimately, the Federal Circuit summarily determined that although the new statutory provisions authorize CUE challenges to both regional office and Board decisions, they do not

"authorize a regional office to review collaterally an earlier Board decision on the same operative facts." *Dittrich*, 163 F.3d at 1356. The Federal Circuit concluded that "title 38 confirms the basic reasoning in *Smith*, upholding the statutory provisions on finality and the orderly adjudicatory system for deciding veteran's claims." *Id.*

2. The phrase "clear and unmistakable error" derives from 38 C.F.R. § 3.105(a), which provides that previous dispositions which are final and binding will be considered correct absent a showing of "clear and unmistakable error." The regulation does not provide a precise definition of "clear and unmistakable error", but both the Federal Circuit and the CAVC have provided a general outline of what constitutes CUE.[1]

In defining clear and unmistakable error ("CUE"), the CAVC has held that "[t]he substantive rights of the veteran have been prejudiced by the Government's failure to apply [the statute] properly and thus, this misapplication of the law constitutes clear and unmistakable error committed by the VA." *Look v. Derwinski*, 2 Vet.App. 157, 163 (1992). In order to assert a valid claim of CUE, an appellant is required to allege, with specificity, the error that denied the veteran a fair and correct adjudication of his claim for service connection. *See, Crippen v. Brown*, 9 Vet.App. 512, 417-418 (1996). Furthermore, a claim of CUE is a collateral attack on a final RO decision. *See, Smith*, 35 F.3d at 1521, *Crippen v. Brown*, 9 Vet.App. 512, 417-418 (1996).

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[1] Neither 38 U.S.C. § 5109A nor 38 U.S.C. § 7111, the statutes regarding CUE, contain a definition of "clear and unmistakable error".

Accordingly, the established case law indicates that a claim of CUE is not a claim for benefits. Instead, the main purpose of a CUE claim is to ensure that the veteran had received a legally correct adjudication of the denial of his benefit claim which includes the application of all relevant regulations and statutes. A claim of CUE requires demonstration of noncompliance with mandatory statutory or regulatory requirements. A successful CUE claim does not result in an award of benefits but functions only as a predicate finding which then results in a right to readjudication, applying the correct legal standards. Such a readjudication does not infer or require a favorable disposition upon readjudication. Claims of CUE are directed at the **means** of claims adjudication and not the **end result**.

Prior to 1997, when Congress enacted Pub. L. 105-111, 38 C.F.R. § 3.105 existed for decades without any statutory authority. However, subsequent to *Smith, supra,* Congress decided to amend title 38 of the United States Code to add new sections. Specifically, 38 U.S.C. § 5109A was added to codify 38 C.F.R. § 3.105(a) and 38 U.S.C. § 7111 was added to supersede the *Smith* holding by providing that prior Board decisions are "subject to revision on the grounds of [CUE]. *See*, H.R.Rep. No. 105-52, at 2 (1997) ("bill would effectively codify this regulation [38 C.F.R. § 3.105(a)], and extend the **principle underlying it to BVA decisions**"). S.Rep. No. 105-157, at 4 (describing *Smith* holding and contravening effect of new law.) (*emphasis added*). Accordingly, the enactment of 38 U.S.C. § 5109A served to codify 38 C.F.R. § 3.105(a) and the enactment of 38 U.S.C. § 7111 served to remedy problems

identified, by the Federal Circuit, in *Smith*, which prevented CUE review of prior BVA decisions, under the provisions of 38 C.F.R. § 3.105(a). Consequently, § 7111 makes it possible by statute to review a BVA determination by collateral attack based upon CUE.

In essence, by the enactments of 38 U.S.C. §§ 5109A and 7111, Congress acknowledged the importance of a veteran's right to collaterally attack prior final BVA decisions, as well as Regional Office determinations. Accordingly, §§ 5109A and 7111 create exceptions to the finality of agency determinations by allowing veterans to **collaterally** attack both regional office and BVA determinations, ensuring that the Department is accountable for providing the veteran a full, complete and correct adjudication of his claim for benefits.

3. The doctrine of "delayed subsuming" was for the first time introduced in the jurisprudence in *Donovan v. Gober*, 10 Vet.App. 404 (1997). In *Donovan*, the CAVC addressed the issue of whether a final unappealed rating decision, denying a veteran's entitlement to service connection, which is subsequently reopened by new and material evidence and adjudicated on the merits of entitlement to service connection by the BVA and thereafter denied; could later be subject to a claim of CUE. In reaching its decision, the CAVC reviewed *Smith, supra*, in which the Federal Circuit held that when a Regional Office decision is appealed to and affirmed by the Board and thus **subsumed** by the Board's decision, no claim of CUE exists as a matter of law under 38 C.F.R. § 3.105(a) with respect to that Regional Office determination. Thus, if a veteran appeals a Regional Office determination and

does not raise the issue of CUE and the BVA subsequently affirms the original Regional Office determination regarding denial of service connection; the veteran is precluded from ever asserting a claim of CUE in the appealed Regional Office determination since the claim of CUE was subsumed by the BVA when it affirmed the Regional Office's determination.

Subsequently, the *Donovan* court determined that the *Smith* opinion could be expanded to provide that where a BVA decision involves review of evidence considered in a prior, **unappealed** Regional Office determination concerning the same issues, a veteran is precluded from presenting a claim of CUE in the prior **unappealed** decision. *Donovan*, 10 Vet.App. at 408.[2] Meaning, that if a veteran decides not to appeal a Regional Office determination, but later seeks to reopen his claim and the BVA allows reopening based on new and material evidence, then the veteran is precluded from ever claiming CUE in the prior unappealed Regional Office determination. This doctrine has been termed "delayed subsuming".

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[2] For example, in the present case, Mr. Dittrich never appealed the **1960** rating decision. However, because of the BVA's 1969 decision that reviewed a **1968** regional office determination on issues completely unrelated to CUE, Mr. Dittrich was denied his right, as a matter of law, from ever collaterally attacking the 1960 rating decision on the basis of CUE.

REASONS FOR GRANTING THE WRIT

The doctrine of "delayed subsuming" has no basis in law and was created by the CAVC as a tool to escape its statutory duty to ensure the systemic fairness and appearance of fairness of the entire veterans benefits adjudication process. Further, "delayed subsuming" completely eradicates the purpose of CUE claims as defined by 38 U.S.C. § 5109A and is not authorized by 38 U.S.C. § 7104(b).

The doctrine of "delayed subsuming" is a CAVC creation, with no basis in any statute, much less 38 U.S.C. §§ 5109A and 7104. A search of all relevant VA statutes and regulations reveals no mention of any such doctrine. It is also important to note that neither the CAVC nor Federal Circuit in *Donovan* provided any statutory support for the doctrine of "delayed subsuming" but merely determined that the doctrine was in keeping with a VA General Counsel's opinion, as well as the *Smith* holding. Such determinations are *ultra vires* and therefore invalid, as a matter of law.

In the present case, the Federal Circuit was presented with the issues of whether the lower court misinterpreted both 38 U.S.C. § 5109A and 38 C.F.R. § 3.105(a) in deciding that a BVA decision regarding entitlement to service-connection subsumes any claims of CUE in a prior unappealed regional office determination. In upholding the lower court's interpretations, the Federal Circuit determined that "delayed subsuming" prevented a collateral challenge pursuant to 38 U.S.C. § 7104(b), thus introducing the first direct attempt at finding any statutory support for the doctrine of "delayed subsuming". However, a

review of 38 U.S.C. § 7104(b) establishes that it provides **no** such support for this defective doctrine.

38 U.S.C. § 7104(b) provides: "[e]xcept as provided in section 5108 of this title, when a **claim** is **disallowed** by the Board, the claim may not thereafter be reopened and allowed and a **claim** based upon the same factual basis may not be considered." (*emphasis added*). The Federal Circuit, not the CAVC, determined that 38 U.S.C. § 7104(b) supported the "delayed subsuming" doctrine in that it provides for the finality of agency decisions that are not subject to a collateral attack. Such reasoning is flawed for two reasons.

First, 38 U.S.C. § 7104(b) relates to **claims**. "Claim" is defined as "formal or informal communication in writing requesting a determination of **entitlement or evidencing a belief in entitlement, to a benefit**". 38 C.F.R. § 3.1(p) (*emphasis added*). Accordingly, 38 U.S.C. § 7104(b) deals only with the BVA's determinations regarding veteran's claims, or requests for entitlement to benefits. Thus, 38 U.S.C. § 7104(b) is clearly intended to prevent a veteran from continually asserting a claim for service-connection based upon the same facts, once the BVA had determined that such a claim was without merit. This interpretation is further supported by the fact that 38 U.S.C. § 7104(b) does not prevent a claim from being reopened if the veteran presents new and material evidence. Accordingly, "claim" constitutes a veteran's request for entitlement to service-connection or some other monetary benefit provided for by law.

A claim of CUE, on the other hand, is not a request for entitlement to service-connection or for monetary

benefits, but constitutes a collateral attack on the adjudication process which previously considered a claim for service-connection or monetary benefits. By presenting a claim of CUE, the veteran does not seek a determination of entitlement to a benefit, but seeks a determination of whether the adjudication process which was previously conducted did so in accordance with law. As such, claims of CUE do not involve a question of entitlement to benefits determination, but instead attack the method of arriving at such a final determination. On the other hand, 38 U.S.C. § 7104(b) addresses the issue of final determinations and not the decision-making process itself. Accordingly, the doctrine of delayed subsuming as prohibiting collateral attacks on prior final decisions, cannot be supported by 38 U.S.C. § 7104(b).

Second, 38 U.S.C. § 7104(b) provides that claims **disallowed** by the Board may not be reopened. In order for the Board to "disallow" a claim, the Board must address the claim. Pursuant to the doctrine of "delayed subsuming", any collateral attack on an unappealed decision is summarily prohibited even if the BVA has never considered the issue of CUE in the unappealed decision. If the BVA has not considered or even addressed the issue of CUE, it stands to reason that the BVA has not disallowed the issue. This argument is further supported by the fact that a veteran's claim of CUE will be denied unless the veteran asserts a claim of CUE with specificity. *See, Crippen, supra.* Accordingly, if a veteran does not identify a claim of CUE with specificity, the BVA will not address the issue. It naturally follows that if the veteran does not even raise the issue of CUE, then the BVA has not addressed the issue, much less denied it. As such, the

Federal Circuit's use of 38 U.S.C. § 7104(b) as supporting the doctrine of delayed subsuming and its denial of a veteran's right to collaterally attack prior unappealed regional office determinations is without merit.[3]

Finally, the doctrine of delayed subsuming directly contradicts the plain language of 38 U.S.C. § 5109A in that the doctrine invalidly adds a restriction to a veteran's right to present a claim of CUE which is not contemplated by the statute. As discussed *supra*, 38 U.S.C. § 5109A was enacted to codify 38 C.F.R. § 3.105. Neither the statute nor regulation place any restrictions on a veteran's right to collaterally attack a prior **final** decision on the basis of CUE. In fact, both the statute and regulation provide an exception to the doctrine of administrative finality, by presenting the veteran with a statutory right to ensure that the administrative adjudicatory process is conducted in accordance with law. This exception to administrative finality was further expanded with the enactment of 38 U.S.C. § 7111 which allows BVA decisions (which were previously considered to be final, unless appealed within a specific time frame) to be collaterally attacked on the basis of CUE as well.

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[3] Mr. Dittrich anticipates that the Solicitor may attempt to argue that the Court should not entertain Mr. Dittrich's arguments regarding 38 U.S.C. § 7104(b) since Mr. Dittrich did not raise any such issues below. However, the Court should note that the issue of whether 38 U.S.C. § 7104(b) supports the theory of delayed subsuming was raised for the first time by the Federal Circuit, *sua sponte*. Therefore, the issue is properly before this Court.

The theory of delayed subsuming, on the other hand, reimposes a regime of administrative finality that Congress clearly intended to overthrow with the veteran's right to collaterally attack such decisions for CUE. As such, the theory of delayed subsuming seeks to create an exception to a veteran's right to assert a CUE claim, that is not explicitly stated in the statutes. Accordingly, the CAVC's doctrine of delayed subsuming is clearly invalid in light of the enactment of both 38 U.S.C. §§ 5109A and 7111.

CONCLUSION

Because the doctrine of delayed subsuming has no valid basis in law and because it serves to deny a veteran of his statutory right to collaterally attack prior unappealed ratings decisions, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals for the Federal Circuit

98-7031

THEODORE J. DITTRICH,

Claimant-Appellant.

v.

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

DECIDED: December 28, 1998

Before NEWMAN, MICHEL, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

The United States Court of Veterans Appeals (Court of Veterans Appeals) upheld the Board of Veterans' Appeals' (the Board) denial of Mr. Dittrich's claim of clear and unmistakable error (CUE) involving a 1960 denial of service connection for a schizophrenic condition. Because the Court of Veterans Appeals correctly construed the appropriate case law and properly interpreted the applicable statutes, namely, 38 U.S.C. §§ 5109A & 7111 (1998), this court affirms.

I.

The appellant, Theodore J. Dittrich, served on active duty in the Army from January 27, 1953 to December 22, 1954. In August 1959, he applied for service connection for a nervous condition. In a rating decision dated March

21, 1960, a Department of Veterans Affairs (DVA) regional office denied Mr. Dittrich's claim. Mr. Dittrich did not attempt to appeal this denial until 1965, at which time the regional office advised him that his appeal was untimely. The regional office, however, continued to receive evidence of Mr. Dittrich's schizophrenia in support of his claim for service connection. In December 1968, the regional office issued a confirmed rating decision stating that the evidence was insufficient to reopen the claim for service connection. In January 1969, the DVA advised Mr. Dittrich of that decision. Mr. Dittrich appealed the January 1969 rating decision to the Board. In light of Mr. Dittrich's new and material evidence, the Board reopened his claim but nonetheless denied him service connection on the merits.

Between August 1979 and June 1993, the Board declined five times to reopen Mr. Dittrich's claim for service connection. At length, Mr. Dittrich appealed the June 1993 decision to the Court of Veterans Appeals. In July 1994, the Court of Veterans Appeals dismissed the issue of new and material evidence, based on a joint motion by the parties, and remanded the claim to the Board to determine whether the March 1960 rating decision evinced CUE. At that time, the regulatory basis for Mr. Dittrich's CUE claim was 38 C.F.R. § 3.105(a). The Board in turn remanded the CUE claim to the regional office because the regional office had not previously adjudicated this issue. The regional office found no well-grounded claim of CUE in the 1960 rating decision. Instead, the regional office determined that examination results at that time "clearly showed that the veteran had

not incurred or aggravated a nervous condition while on active military duty."

The claim returned to the Board which concluded in an August 1996 decision that its June 1969 decision had considered all the evidence compiled before that date and had thus effectively denied the 1960 claim as well. Based on this conclusion, the Board denied Mr. Dittrich's claim of CUE in the 1960 rating decision as a matter of law. Mr. Dittrich appealed this decision to the Court of Veterans Appeals. During the pendency of that appeal, Congress enacted Pub.L. No. 105-111, 111 Stat. 2271 (Nov. 21, 1997). This new law amended title 38 of the United States Code to include §§ 5109A and 7111. 38 U.S.C. § 5109A basically codifies 38 C.F.R. § 3.105(a), providing a statutory basis for a claim of CUE in regional office decisions. 38 U.S.C. § 7111, however, expressly allows review of Board decisions for CUE, which had previously been prohibited.

On January 6, 1998, the Court of Veterans Appeals upheld the Board's conclusion that its 1969 decision had subsumed its earlier 1960 rating decision. The court based its holding on *Donovan v. Gober*, 10 Vet.App. 404 (1997), and *Chisem v. Gober*, 10 Vet.App. 526 (1997). The Court of Veterans Appeals determined that enactment of Pub.L. No. 105-111 had not altered its rulings in *Donovan* and *Chisem*. Mr. Dittrich appealed to this court.

II.

Under 38 U.S.C. § 7292 (1998), this court lacks jurisdiction to review factual determinations challenged in appeals from the Court of Veterans Appeals except to the extent they present constitutional issues. *See* 38 U.S.C.

§ 7292(d)(2). However, 38 U.S.C. § 7292(a) gives this court authority to review an interpretation of a statute or regulation by the Court of Veterans Appeals as long as that court relied on that interpretation in making its decision. According to the statute, this court sustains an interpretation of the Court of Veterans Appeals unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right." 38 U.S.C. § 7292(d)(1). This court reviews legal determinations of the Court of Veterans Appeals *de novo*. *See Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed.Cir.1991).

After the Board has denied a claim for benefits, a regional office (or agency of original jurisdiction) cannot thereafter consider or grant a claim upon the same factual basis. *See Spencer v. Brown*, 17 F.3d 368, 371-72 (Fed.Cir.1994). Title 38 set forth this rule to preserve the finality of Board decisions: "Final decisions on such appeals shall be made by the Board. . . . Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. § 7104(a) & (b) (1998). This statute, therefore, prevents a regional office from reopening and allowing a claim disallowed by the Board, unless the 38 U.S.C. § 5108 (1998) requirement of new and material evidence has been satisfied. Furthermore, to underscore the finality of Board decisions, the last phrase of subsection (b) forbids a regional office from even considering a claim based on the same operative facts as the claim earlier rejected by the Board.

In *Smith v. Brown*, 35 F.3d 1516 (Fed.Cir.1994), this court recognized the impropriety of allowing an agency of original jurisdiction to review a claim of error in a Board decision: "[Review of a Board decision by a regional office] would, oddly, permit an inferior to collaterally review the actions of a superior." *Id.* at 1526. Thus, if permitted to collaterally review an earlier regional office decision on a claim already disallowed in a Board decision, a regional office would have authority to consider and possibly revise the Board's decision. Title 38 forbids this type of collateral challenge. *See* 38 U.S.C. § 7104(b). In sum, once the Board has denied a claim, an agency of original jurisdiction may not revise or even consider a claim based on the same operative facts, unless new and material evidence warrants reopening the claim. *See Spencer*, 17 F.3d at 371-72.

Based on this same line of reasoning, the Court of Veterans Appeals prohibited a regional office from altering a final decision to conflict with a prior Board decision which rested on the same operative facts. *See Donovan*, 10 Vet.App. at 409. In *Donovan*, a regional office denied the claimant's request for a service connection in 1947. The claimant did not appeal. Thirty-eight years later Donovan again sought benefits. In 1988, the Board denied a service connection for post traumatic stress disorder. The Court of Veterans Appeals observed that "the 1988 [Board] decision made a de novo review and essentially reviewed the 1947 [regional office] decision." *Id.* at 408. This court has recently affirmed this result. *See Donovan v. West*, 158 F.3d 1377 (Fed.Cir.1998). This court reasoned:

> In sum, although in its 1988 decision the Board, on the basis of the augmented record

> before it, held that *Donovan* had not established "service connection for a chronic augmented psychiatric disorder," it also ruled that the record before the regional office in 1947 did not show error, much less "clear and unmistakable error" in that office's decision in that year denying Donovan's claim based upon "gastric neurosis and psychoneurosis." That is precisely the issue that Donovan now seeks to litigate in the present case. . . .
>
> The 1988 Board decision bars him from [doing so].

Id. at 1381-82.

This recent decision affirming the Court of Veterans Appeals does not, however, completely control the outcome in this case. When the Court of Veterans Appeals decided *Donovan*, P.L. 105-111 had not yet been enacted. Thus, the Court of Veterans Appeals applied the predecessor regulation, 38 C.F.R. § 3.105(a), permitting CUE review. *See Donovan*, 158 F.3d at 1381. This court in review also examined the standards supplied by that regulation. Thus, this court has not authoritatively addressed whether P.L. 105-111 requires a result different than that reached in *Donovan*.

The new enactment reads: "A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised." 38 U.S.C. § 5109A (1998). Again, 38 U.S.C. § 5109A basically codified its predecessor regulation, 38 C.F.R. § 3.105(a). Thus, title 38 now expressly authorizes reversal or revision of regional office decisions based on CUE.

Review for CUE may commence "on the Secretary's own motion or upon request of the claimant." 38 U.S.C. § 5109A(c). 38 U.S.C. § 7111 adds that decisions of the Board may also be revised for CUE, either upon the Board's own motion or at the claimant's request. *See* 38 U.S.C. § 7111.

In *Donovan*, the claimant had also raised the applicability of P.L. 105-111. In that case, the claimant noted that the statute authorizes a CUE challenge to a decision of the Secretary "at any time after that decision is made." 38 U.S.C. § 5109A(d). Thus, the claimant had hoped to invoke the statute to permit regional office review despite the intervening Board determination. This court dismissed that argument:

> Although the statute, unlike the regulation, provides that a request for revision of a decision for "clear and unmistakable error" may be made "at any time after that decision is made," that provision relates only to the timing of such a request. It makes explicit what was implicit in the regulation: that there is no time-bar upon such requests. As a mere codification of the regulation, the provision does not permit something the regulation would not: a collateral challenge to a regional office decision after the Board has sustained it.

Donovan, 158 F.3d at 1383 (citations omitted). This pronouncement governs in this case as well. The new statutory provisions authorize CUE challenges to both regional office and Board decisions. They do not, however, authorize a regional office to review collaterally an earlier Board decision on the same operative facts.

These recent statutory enactments do make one significant change to prior law. Specifically, they replace that portion of the *Smith* decision which found no authority for CUE review of a Board decision. As noted above, 38 U.S.C. § 7111 now expressly authorizes CUE review of Board decisions. However, this statutory authority allows only the Board itself, not a regional office, to conduct CUE review of its prior decisions. In this respect, title 38 confirms the basic reasoning in *Smith* upholding the statutory provisions on finality and the orderly adjudicatory system for deciding veterans' claims. *See Smith*, 35 F.3d at 1526.

III.

In this case, the Board in 1969 rejected Dittrich's claim for service connection after considering the entirety of the evidence before the regional office in 1960 in addition to some new and material evidence acquired in the interim. Thus, the Board's 1969 decision necessarily subsumed the 1960 regional office decision. Although the Board could review its own 1969 decision under 38 U.S.C. § 7111, Dittrich effectively requests instead that the regional office collaterally review the Board's 1969 decision. Nothing in title 38 or elsewhere authorizes a regional office to review decisions of the Board. Moreover, authorizing a regional office to review the 1960 decision (and thus to collaterally review the Board's 1969 decision) would violate 38 U.S.C. § 7104(b) and its principles of finality.

In sum, the Court of Veterans Appeals correctly construed the law, including the most recent enactments in

title 38, in denying Mr. Dittrich's request. The decision of the Court of Veterans Appeals is therefore affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED.

APPENDIX 2

UNITED STATES COURT OF VETERANS APPEALS

No. 96-1590

THEODORE J. DITTRICH, APPELLANT,

V.

TOGO D. WEST, JR.,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided **JAN -6 1998**)

Kenneth M. Carpenter was on the brief for the appellant.

Robert E. Coy, Acting General Counsel; *Ron Garvin,* Assistant General Counsel; *Adrienne Koerber,* Deputy Assistant General Counsel; and *Amy S. Gordon* were on the pleadings for the appellee.

Before FARLEY, HOLDAWAY, and GREENE, *Judges.*

FARLEY, *Judge:* This is an appeal from an August 30, 1996, decision of the Board of Veterans' Appeals (BVA or Board) dismissing the veteran's claim that a March 1960 rating decision denying service connection for a psychiatric disability was the product of clear and unmistakable error (CUE). This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons that follow, the Court will affirm the Board's August 30, 1996, decision.

I.

The appellant, Theodore J. Dittrich, served on active duty in the U.S. Army from January 1953 to December 1954. Record (R.) at 29. In March 1960, the veteran's claim for service connection for psychosis was denied by the VA regional office (RO) which found no "evidence of a psychosis or of characteristic manifestations thereof to a disabling degree of 10% within a period of 1 year following separation from active duty." R. at 128. The veteran did not submit a timely appeal to that decision.

In July 1965, after receiving a letter from VA confirming that he would continue to receive a non-service-corrected pension (R. at 210), the veteran sent a letter to the RO stating that he wished to appeal the 1960 rating decision (R. at 212). The RO responded by letter informing the veteran that the time limit to appeal that decision had expired. R. at 215. The RO subsequently received additional evidence regarding the veteran's claim for service connection and, on December 16, 1968, issued a confirmed rating decision denying the veteran's claim because the evidence submitted was not new and material. R. at 228-29. The veteran filed a timely appeal and the Board issued its decision on June 18, 1969. R. at 252. The Board reopened the claim and found that (1) schizophrenic reaction was not present during the veteran's period of service, nor was it shown upon his discharge examination; and (2) schizophrenic reaction was not initially medically reported until over two years after the veteran's separation from service. R. at 255. The Board concluded that "[s]ervice connection [was] not warranted for schizophrenic reaction on the basis of incurrance or aggravation during service. It was not manifested to a

degree of ten per cent [sic] (10%) or more within one year following termination of active wartime service." R. at 255.

The veteran's claims to reopen his claim for service connection were denied by the Board in 1979, 1980, 1986, 1991, and 1993. R. at 258-291. The veteran appealed the 1993 BVA decision and, on July 14, 1994, based upon the parties' joint motion, this Court dismissed the veteran's claim to reopen and remanded his claim of CUE in the March 1960 rating decision. R. at 311-20. The Board subsequently remanded the CUE claim to the RO. R. at 322-25. On June 9, 1995, the RO issued a rating decision concluding that a "well[-]grounded claim of clear and unmistakable error in [the] rating decision of 3-7-60 [had] not been presented." R. at 328. By letter dated July 24, 1996, the RO returned the file to the BVA stating that pursuant to *Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994), the RO had no jurisdiction to consider the claim. R. at 411.

It is not clear from the record on appeal whether the Board's August 30, 1996, decision was issued on the basis of an appeal by the veteran (*see* R. at 339), or as a result of the RO's July 1996 letter (R. at 411). In the August 1996 decision, the BVA found that the March 1960 rating decision had been subsumed by the June 1969 BVA decision. R. at 9-14. Accordingly, the Board concluded that no CUE claim existed as a matter of law and dismissed the claim. *Id.* This appeal followed.

II.

"Previous determinations which are final and binding . . . will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. § 3.105(a) (1996). To establish a valid CUE claim, "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied." *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc). It is not enough for the appellant to merely disagree as to how the facts were weighed or evaluated.

In *Smith*, the Federal Circuit held, inter alia, that 38 C.F.R. § 3.105(a) was applicable only to "review of A[gency of] O[riginal] J[urisdiction] adjudicatory decisions and not to those of the Board." 35 F.3d at 1527. In *Donovan v. Gober*, 10 Vet.App. 404 (1997), this Court found that the reasoning and result in *Smith* applied to a situation in which a final, unappealed rating decision was reopened and adjudicated on the merits by the BVA. The Court held that the unappealed RO decision subsequently reviewed de novo on the merits by the Board was subsumed by that BVA decision and thus not subject to a claim of CUE as a matter of law. *Id.* at 408. Recently, in *Chisem v. Gober*, the Court affirmed the Board's dismissal of a claim of CUE in an unappealed RO decision which was subsumed by a later BVA decision addressing the same issue decided by the RO. ___ Vet.App. ___, ___, No. 96-166, slip op. at 4 (November 14, 1997). The June 1969 BVA decision reopened and fully readjudicated the same claim that was the subject of the March 1960 rating decision. The 1960 decision was therefore subsumed by the 1969 BVA decision. *See Chisem*, *Donovan*, and *Smith* all

supra. Accordingly, the Board did not err in dismissing the claim.

The Court has considered the recent act amending title 38 of the U.S. Code by inserting new sections 5109A and 7111. Pub. L. No. 105-111, 111 Stat. 2272 (November 21, 1997). This act codifies 38 C.F.R. § 3.105(a) and, abrogating *Smith, supra,* in part, makes BVA decisions subject to revision by the BVA based upon CUE. *Id.* Judicial review of a BVA decision denying a claim of CUE in an earlier BVA decision would then be available. The act, however, does not affect the Court's decisions in *Chisem* and *Donovan.* Pursuant to the Court's holdings in those cases, the March 1960 RO decision was subsumed by the June 1969 BVA decision and the RO decision, therefore, is not subject to a CUE claim. Although sections 5109A and 7111 may have made the June 1969 BVA decision itself subject a CUE claim, a BVA decision on such a claim is not now before this Court.

III.

Upon consideration of the record and the briefs of the parties, the Court holds that the appellant has not demonstrated that the Board committed either factual or legal error which would warrant reversal or remand. *Gilbert v. Derwinski,* 1 Vet.App. 49 (1990); *see also Anderson v. City of Pessemer City,* 470 U.S. 564 (1985); *Danville Plywood Corp. v. United States,* 899 F.2d 3 (Fed. Cir. 1990). The Court also is satisfied that the BVA decision meets the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See, Gilbert, supra.* Accordingly, the August

30, 1996, decision of the Board of Veterans' Appeals is AFFIRMED.